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In the Supreme Court of the United States

October Term, 1977

No. 77-1629

WAYMAN OTIS WILKES,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION ONE

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WAYMAN OTIS WILKES,

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STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Warren E. Burger, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Wayman Otis Wilkes, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, entered in the above entitled case on November 18, 1977.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, is unreported and is printed in Appendix "A" hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeal of California, Second Appellate District, Division I, was entered on November 18, 1977, affirming Petitioner's conviction dated April 29, 1975 (RT[1] 79-81). Thereafter on February 16, 1978, the highest State Court, the Supreme Court of California denied a timely filed Petition for Hearing.[2] Said denial is printed as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A. Brief Factual Framework of the First Two Questions:

Petitioner had pled guilty to conspiracy to commit various misdemeanors, a felony (RT 73); and had his sentence deferred by the trial judge until after the trial by the same judge (with a jury) of a co-defendant.

At the time of the plea, the trial judge admonished

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[1]Abbreviations used in this brief are as follows: CT - Clerk's Transcript; RT - Reporter's Transcript; SCT - Clerk's Transcript in the case of *People v. Silverton*, Appellate 2d Crim. 28211; SRT - Reporter's Transcript in the case of *People v. Silverton*, Appellate Court No. 2d Crim. 28211; OP - Opinion of the Court of Appeal in this case which is appended hereto as Appendix "A."

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[2]Where the highest State Court has jurisdiction to review a decision of a lower State Court, but refuses to do so, the time for filing an appeal extends from the date of refusal to review. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21, 68 L. Ed. 140, 44 S. Ct. 11.

Petitioner "to cooperate in a reasonable and truthful manner with either side in the case should he be chosen to be called as a witness (RT 77). At co-defendant's trial the prosecution called petitioner as its witness and asked questions, over the objection of defendant, designed to elicit that the Petitioner had pled guilty to many of the same charges for which defendant was then on trial (SRT 1630, lines 5-17; 1680-1691).

Petitioner at first responded that he had only pled guilty to a misdemeanor, but thereafter throughout extended questioning by the prosecution admitted that he had pled guilty to the felony of conspiracy to commit various misdemeanors on the mistaken belief it was a misdemeanor (SRT 1826; 1890-2009).

During the aforestated extended questioning of Petitioner, the following pertinent events occurred in sequence:

(a) The prosecutor requested the trial judge to counsel the witness on the law of perjury (SRT 1890, lines 1-2); and stated that he felt that the witness was committing perjury (SRT 1893, line 28 to 1894, line 9).

(b) The trial judge stated that the response of the Petitioner "would certainly have some effect on the Court's thinking process as to what the defendant's state of mind is when I try to decide what would be the appropriate sentence at the time of sentencing, and he has not yet been sentenced." (SRT 1891, lines 12-21.)

(c) Petitioner asked the trial judge: "Would it be advisable for me to have my attorney here?" The trial judge stated: "I don't think so at this particular moment." (SRT 1895, lines 2-14.)

Petitioner responded in the following manner to the question of the prosecution as to whether he felt his taking the witness stand "will affect your sentence?" "Yes" (SRT 1945, line 22).

B. Questions Within the Factual Framework set forth in "A," above:

(1) Whether Petitioner was denied his right under the Sixth Amendment to the Federal Constitution to have the assistance of counsel.

(2) Whether Petitioner was denied his right under the Fifth Amendment to the Federal Constitution not to incriminate himself.

C. Brief Factual Framework of the Third and Fourth Questions:

The opinion of the Court of Appeal of the State of California on page 8 thereof, third paragraph from the bottom (Appendix A, *infra*) correctly states:

> "The prosecution of Appellant Wilkes [Petitioner herein] for violation of former section 1310 of the Health and Safety Code . . . was commenced before the effective date of that section on January 1, 1974."

The opinion of the Court of Appeal of the State of California in the same paragraph from which the above quote is extracted, in the sentence following the aforequoted statement, goes on to say that former section 1310 (the offense with which Petitioner herein stands convicted) became effective on January 1, 1974, the same date it was repealed.

Said repeal had no "savings clause" [§ 1310 is printed in the attached Appendix "C," and its repeal in the attached Appendix D].

D. Questions Within the Factual Framework of "C," above.

(3) Whether the making of Petitioner's conduct prior to January 1, 1974, criminal by virtue of passing a law on

January 1, 1974, making it criminal, is an ex post facto law that denies Petitioner his rights under the Federal Constitution (Article I, Sections 9 and 10).

(4) Whether punishing Petitioner for violation of a criminal statute which is repealed before the conviction becomes final when the repeal has no clause providing for saving of its sanction against past transgressors, is contrary to "a universal common law rule" as applied by the United States Supreme Court in *Bell v. Maryland* (1964) 378 U.S. 336, 340, 12 L. Ed. 822, 826, 84 S. Ct. 1814.

CONSTITUTIONAL PROVISIONS AND RULE OF LAW INVOLVED

1. That part of the Sixth Amendment to the Federal Constitution giving the accused in all criminal prosecutions the right to have assistance of counsel for his defense. (Printed in full in Appendix "E.")

2. That part of the Fifth Amendment to the Federal Constitution providing that no person shall be compelled in any criminal case to be a witness against himself. (Printed in full in Appendix "F.")

3. Those parts of Article I, Sections 9 and 10 prohibiting the passage of an ex post facto law by either the Federal Government or a State. (See Appendix "G" for printing *in haec verba*.)

4. As to number "4," *supra*, of "Questions Presented":

> "[A] universal common law rule that when the legislature repeals a criminal statute . . . , this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not reached final disposition in the highest court authorized

to review it." *(Bell v. Maryland* (1964) 378 U.S. 336, 340, 12 L. Ed.2d 822, 826, 84 S. Ct. 1814)." (18 Cal.3d 304).

STATEMENT OF THE CASE

On June 14, 1974, a 14-count indictment was filed against petitioner and co-defendant Ronald R. Silverton (there were other co-defendants also). (CT 1.) In this indictment, Petitioner was charged with violation of Section 182.1 of the *Penal Code* (Count I) (CT 1), violation of Section 224(q) of the *Civil Code* (Count VIII) (CT 11), violation of Section 1310 of the *Health & Safety Code* (Count IX) (CT 12), violation of Section 1508 of the *Health & Safety Code* (Count X) (CT 13), and violation of Section 273a of the *Penal Code* (Count XIV) (CT 17).

On September 13, 1974, petitioner joined in motions made by co-defendant Silverton to annul the indictment, for various reasons, and in a demurrer to the indictment, which raised, among other things, that Section 1310 of the *Health & Safety Code* was not in effect during the period, July 1, 1973, to December 31, 1973 (CT 37). These motions and the demurrer were denied in various hearings occurring from September 17, 1974, through September 30, 1974. (CT 38-47.)

A trial of the matter commenced on February 18, 1975, at which time, pursuant to a plea bargain, petitioner changed his plea to guilty to a modified Count I of the indictment. Count I charged violation of Section 182(1) of the *Penal Code*. The District Attorney stated to the Court that for purposes of the plea the People deleted two of the purposes and objects of the conspiracy contained in one of the first two paragraphs of Count I and the third paragraph

in Count I. The purpose of this omission was to remove all felonies as objects of the conspiracy and to leave only as the purpose and objects of Count I, misdemeanor paragraphs; one of which was Count IX, a violation of Section 1310 of the *Health & Safety Code* (RT 73). Part of the plea bargain was that the maximum sentence that the Court could impose would be up to one year incarceration in the County Jail, but no more, and that Petitioners would be placed on probation for a period of time to be determined by the Court (RT 75). As part of the plea bargain, it was stated that the People would not be pursuing prosecution of the other charges contained in the indictment (RT 76). The Court stated to petitioner that if either side chose to call him as a witness in that matter, that he must cooperate in a reasonable and truthful manner with either side in the case (RT 77).

On March 11, 1975, in the case of *People v. Ronald Silverton*, Case No. A 308 468 (2d Crim. 27380), the People called Petitioner herein, Wilkes, as a witness by and on behalf of the People, and he was sworn and examined (SRT 1630, lines 5-17). The prosecutor asked the petitioner, "Were you convicted of a felony in this Court in the month of February, 1975?" The petitioner responded "In this Court I pled guilty to a conspiracy, yes, misdemeanor."(SRT 1687, lines 19-22.) For the next four pages of transcript, the prosecutor harangues petitioner witness about the fact that conspiracy to commit a misdemeanor is a felony (SRT 1680-1691).

On cross-examination, which took place on March 13, 1975 (SRT 1826), petitioner witness stated he now understood that his plea of guilty to conspiracy to commit various misdemeanors was in fact a felony. Thereafter, the prosecutor stated:

"I would ask, your Honor, that the Court

counsel the witness on the law of perjury." (SRT 1890, lines 1-2.)

Thereafter, counsel for both parties approached the bench and the Court states:

> "And it goes without saying that as far as Mr. Wilkes is concerned, if on one occasion he says, yes, he admits the truth of the charge and if on another occasion, he says, 'I admit it but I'm really saying that I didn't do it,' that's up to him. And that would certainly have some effect on the Court's thinking processes as to what the defendant's state of mind is when I try to decide what would be the appropriate sentence at the time of sentencing, and he has not yet been sentenced." (SRT 1891, lines 12-21.)

Counsel for defendant expressed some concern about the effect of the witness's testimony on his future sentence (SRT 1893, lines 10-18). The prosecutor stated that he felt that the witness was committing perjury (SRT 1893, line 28 - 1894, line 9). Immediately thereafter, the witness stated to the Court:

> "Would it be advisable for me to have my attorney here?"
>
> The Court stated:
> "I don't think so at this particular moment."

Witness (SRT 1895, lines 2-14), stated from the witness stand in response to the question as to whether he felt his taking the witness stand, as requested by the District Attorney, "will affect your sentence?" "Yes." (SRT 1945, line 22.)

The District Attorney, on redirect, asked his witness:

> "Did you admit that to the truth of the charges

that you pled guilty to, conspiracy to violate the adoption laws in violation of 182(1) of the Penal Code, conspiracy to commit various crimes?

"A: Yes. I made that statement.

"Q: And you admitted the truth of them; did you not?"

"A: I'm making that statement. I did, yes.

"Q: Was that statement true or false?"

"THE WITNESS [WILKES]: I did not have the statutes in front of me. I didn't recall what those statutes might have said or what they implied. I took the advice of counsel and pled guilty. I told them I would cooperate with the District Attorney and tell them everything I know. And I've done so."

> "MR. MOSS [PROSECUTOR]: I move to strike the answer as being nonresponsive.
>
> "THE COURT: The motion is granted. The answer is stricken. The jury is admonished to disregard it in its entirety."

The above colloquy took place at SRT 2002, line 9 - 2003, line 15. Thereafter, the Court stated:

> "I find the question quite straightforward. I find the attempt to answer it evasive." (SRT 2003, lines 27-28.)

This questioning concerning that question covered an additional four pages of transcript (SRT 2005 - 2008) and the Court then stated about the witness, appellant:

> "I wouldn't necessarily hold him in contempt. I find no ambiguity in that question at all. If he's not going to answer it, he's not going to answer it. And the jury can draw whatever inference they

> choose to draw from it. And, of course, I will draw my own . . . . When people don't choose to tell the truth, I consider they are creating their own pressure." (SRT 2008, line 21 - 2009, line 3.)

This type of haranguing concerning this question then goes on for an additional eight more pages of transcript (SRT 2009, line 4 - 2016 A, line 1).

On April 29, 1975, petitioner appeared before the Trial Court with his attorney and stated that there was no legal cause why sentence should not be pronounced (RT 79-81). The Court suspended the imposition of sentence (RT 81), denied formal probation, placed petitioner on summary probation for a period of three years on the condition that he spend his first nine months in the County Jail. The Court stated that it considered the charge a felony. On motion of the People, the remaining Counts of the indictment with which petitioner was charged, *i.e.*, Counts VIII through X and XIV, were dismissed in the interests of justice (CT 50). Bail on appeal was set at $2,000, in the event petitioner filed an appeal (CT 52). The appeal was filed (CT 53) with the California Court of Appeal, Second Appellate District (2d Crim. No. 27380) raising the issues that petitioner herein was denied his rights under the Sixth and Fifth Amendments to the Federal Constitution, which issues are raised herein by questions "1" and "2," respectively.

After the briefs had been filed by both Appellant and Respondent in the instant matter, the Court of Appeal, Second Appellate District, but a different Division (Division Four), reversed the conviction of co-defendant Silverton (*People v. Silverton*, 2d Crim. 28271) on the grounds that the revocation of § 1310 by the California Legislature prior to the final determination of the case was

a remission within "a universal common law rule" as applied by the United States Supreme Court in *Bell v. Maryland, supra*. (Said pertinent parts of the *Silverton* opinion are printed herein as Appendix "H.") The California Supreme Court ordered that the Silverton opinion not be published but permitted the case to stand. (That order of the California Supreme Court is printed herein as Appendix "I.") This reversal was raised by petitioner herein during oral argument on his appeal in the California Court of Appeal, and that court granted each party permission to file a Supplemental Brief on the point of § 1310 not being applied to petitioner herein consistent with his constitutional rights. These points are raised by questions "3" and "4" herein, *supra*. (See opinion of Court of Appeal, wherein permission to raise point was granted, Appendix "A" *infra*, page 7.)

On November 18, 1977, the Court of Appeal, Second Appellate District, Division One, filed the Opinion affirming the judgment and sentence. Said Opinion is printed herein as Appendix A, *infra*.

Thereafter each of the points aforementioned, and which are embodied within the four questions here raised, was timely raised by Petition for Hearing in the Supreme Court of the State of California, the highest State Court, which petition was denied without opinion on February 16, 1978, (Said denial is printed herein as Appendix "B.")

Thereafter, on March 17, 1978 the petitioner herein filed with the Court of Appeal of the State of California, Second Appellate District, Division One — the court to whom this instant writ is addressed, a "Notice of Petition for a Writ of Certiorari to the Supreme Court of the United States." (A copy of this notice stamped by the said Appellate Court is printed herein as Appendix "J.") Said notice designated as grounds for the petition, the Federal

issues raised by the "Questions Presented" herein.

Thereafter on May 9, 1978, Federal District Court Judge, Francis C. Whelan, sentenced petitioner herein to 15 months of incarceration; in a federal prison as punishment for petitioner herein violating his federal probation by virtue of the State Court's conviction of which this instant Petition requests review. (See transcript of said Federal Court proceedings, printed infra as Appendix "K.") Said 15-month sentence was in addition to, and not to be concurrent with, the nine months of incarceration ordered by the State Court because of said conviction. (Exhibit K, page 26 thereof, lines 20-25.)

REASONS FOR GRANTING THE WRIT

1. IT IS IMPORTANT THAT THIS COURT EXTEND THE CONSTITUTIONAL PROTECTION OF THE FIFTH AND SIXTH AMENDMENTS OF THE FEDERAL CONSTITUTION TO THE NUMEROUS SITUATIONS WHERE A NON-DEFENDANT WITNESS IS INDUCED TO TESTIFY WITH THE IMPLICIT, IF NOT EXPRESSED, PROMISE OF LENIENCY IF HE HELPS TO IMPLICATE THE DEFENDANT ON TRIAL, COUPLED WITH THE THREAT IMPLICIT IN THE PENDING CRIMINAL PROCEEDINGS AGAINST HIM IF HE DOES NOT.

The Constitutional mandate of the Fifth Amendment is clear: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The privilege "transcends its origins" and is fulfilled only when the accused is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Miranda v. Arizona*, (1966) 384 U.S. 432; 86 S. Ct. 1602; 16 L. Ed.2d 694.

But to know the existence of this right, and when it may be applied requires one to be skilled in the law. Thus the right to counsel as embodied within the *Sixth Amendment to the Federal Constitution*, as applied to the States by the *Fourteenth Amendment* Due Process Clause, does make any proceedings void under the *Federal Constitution when the circumstances show a fundamental unfairness to the defendant. Betts v. Brady*, (1942) 316 U.S. 455; 62 S. Ct. 1252; 86 L. Ed. 1595. The Fifth and Sixth Amendment rights would be meaningless in the absence of a knowledge of these rights and an intelligent waiver thereof, and the very purpose of the duty thus enjoined upon the Court is to advise an accused and to preserve to him a right which the Constitution has conferred upon him.

In the instant case, the Court was in the situation where from the quoted record it was obvious that petitioner was being put into a position where the Trial Court was being adversely affected in its thought concerning the sentencing of defendant and though the ultimate sentence of nine months of incarceration was less than the year that the Court might have given, it was also greater than the straight probation without incarceration, which it might have given.

The Court's failure to assign an attorney to the petitioner to advise petitioner of his jeopardy was concurrent with the failure of the Trial Court to warn petitioner of the danger of his testimony with regard to the possible increase of petitioner's sentence of incarceration. Because, though the Trial Court was bound by the plea bargain not to sentence petitioner to more than one year, it could certainly by virtue of petitioner's testimony, sentence petitioner to anywhere up to one year; and, in fact, it did sentence petitioner to nine months incarceration, where said sentence could have been no incarceration.

Although the testimony of petitioner in the *Silverton* trial was collateral to his own proceedings, the two proceedings arose out of the same indictment, and further, both were held before the same trial court. It would follow, then, that since petitioner had not yet been sentenced on his plea, he would be placed in a position of jeopardy by being forced to either incriminate himself on the remaining charges or be in the position in which he found himself, viz: in a position of incredibility with the trial court; thereby influencing the trial court on the question of sentencing which was still remaining.

Had petitioner had the benefit of counsel during his testimony in the *Silverton* trial, he could have discussed with him the advisability and manner of responding to certain questions, and thus, would have lessened or eliminated the amount of disfavor in which he was placed with the trial court. The term "lessened" is used here since the record tends to infer that some amount of disfavor may have existed in that the trial court when assigning the matter for a probation report and setting the matter for a probation and sentence hearing ordered petitioner to cooperate in a reasonable and truthful manner with either side in the case should he be chosen to be called as a witness (RT 77). The Court may have considered that petitioner's refusal to answer certain questions on the ground that it would incriminate him to be unreasonable. This inference could be drawn from the fact that the Court did not, when it made such an order, advise petitioner of his right to have counsel present with him should he be called to testify by either side.

Not only was petitioner not advised of his right to counsel, but also pressure was applied upon him by the Court in ordering him to testify if he were called to do so by either side. The court was shown petitioner's concern over his possible jeopardy when petitioner questioned the

Court whether it would be advisable for him to have an attorney present, and the Court replied that it did not think so at that particular time (SRT 1895). That this request occurred immediately after the Court indicated that appellant was not telling the truth on the witness stand is significant. The record is replete with comments made by the Court to the effect that appellant's testimony at the time of the *Silverton* trial was affecting the court's determination of an applicable sentence at the subsequent sentencing hearing concerning petitioner. (See the above "Statement of the Case.") Had petitioner had counsel present, petitioner would have had the benefit of expert advice in this precarious position, and, counsel could also have made the Court aware of this position petitioner was placing himself in during his testimony in the *Silverton* trial, and yet, at no time did the Court advise petitioner of his right to have counsel present.

The Court committed further error in not advising petitioner of his constitutional guarantee not to incriminate himself. Not only did the Court passively effect petitioner's constitutional right, but actively inhibited his pursuance thereof by affirmatively ordering petitioner to testify in the event he was called as a witness, and doing so immediately after scheduling a probation and sentence hearing, thereby implying to appellant that it was a condition that the Court would consider in rendering its sentence at said hearing. For reasons hereinbefore stated, to wit, that appellant was still facing sentencing on the charge to which he had pled guilty, it is submitted that all stages of the proceedings with respect to the latter had not been completed, and therefore his constitutional guarantees against self-incrimination remained intact.

Justice and fair play would dictate that this Court extend the Fifth and Sixth Amendments of the Federal

Constitution to prevent a non-defendant witness from testifying under the duress caused by prospects of his own impending sentence.

2. THE PUNISHMENT OF PETITIONER FOR VIOLATING AN EX POST FACTO LAW; AND EVEN MORE SO, ONE THAT HAS BEEN REPEALED PRIOR TO THE FINAL DISPOSITION OF PETITIONER'S CASE, IS AN INJUSTICE AND OUTRAGE WHICH CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

As afore-noted, Petitioner was sentenced to nine months incarceration by the State Court; and now faces an additional fifteen months incarceration in a Federal prison, as a sole result of this conviction. (Appendix "K" printed herein.) The disinterest of the Justices of the United States Supreme Court in the effect of injustice on one litigant has been well publicized.[3] Yet the clearly erroneous decision if left to stand deprives petitioner of a large chunk of his liberty in flagrant defiance of the Constitution. There is precedent for the United States Supreme Court taking notice of, and correcting, an obvious injustice to an individual litigant. *Moore v. Dempsey* (1923) 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543.

It is an obvious injustice to punish petitioner for violating *Health & Safety Code* Section 1310 from July 1, 1973 to December 31, 1973, though it was not effective until January 1, 1974. The Opinion of the Court of Appeal in this instant case properly stated on page 8 (Appendix

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[3]Chief Justice Vinson stated in this connection:

"What the Court is interested in is the actual, practical effect of the disputed decision — its consequence for other litigants and in other situations." Speech before the American Bar Association at St. Louis. September 7, 1949, 69 S. Ct.

"A" printed *infra*) thereof that:

> "[T]he prosecution of appellant Wilkes for violation of former Section 1310 of the Health & Safety Code (maintaining a home finding agency [placing children for adoption] without a license) was commenced before the effective date of that section on January 1, 1974."

The Appellate Court's afore-quoted statement that former *Health & Safety Code* Section 1310 was not in effect during the period that the indictment states that defendant violated that statute is, as a matter of fact, correct.

The indictment charges petitioner with a violation of Section 1310, *Health & Safety Code of California*, a misdemeanor, committed during the period July 1, 1973, and ending on or about the 31st day of December, 1973 (SCT 377).

The co-defendant first raised the issue that Section 1310 of the *Health & Safety Code* was not in effect during the period July 1, 1973, to December 31, 1973, by demurrer (SCT 458, 498, at page 488), which demurrer was joined in by petitioner Wilkes (CT 38). This demurrer was denied (SCT 522, CT 38). The co-defendant, Silverton, then petitioned the Appellate Court (2d Civil 45016) for a Writ of Prohibition to prevent the prosecution on the non-existent statute. This petition was denied without opinion; and then co-defendant, Silverton, petitioned for hearing to the California Supreme Court; which petition was denied without opinion.

Former *Health & Safety Code* Section 1310 did not take effect until January 1, 1974; the same date that its repeal became effective under Statute Chapter 1202, enacted in the Regular 1973 Session of the California

Legislature. (Page 8 of Appellate Court opinion printed *infra* as Appendix "A.")

The making of petitioner Wilkes' conduct prior to January 1, 1974, criminal by virtue of passing a law on January 1, 1974, making it criminal is an ex post facto law; that is, it is a retroactive criminal statute applying to crimes occurring before its enactment and substantially injuring the accused by punishing an act, innocent when done, or increasing the punishment, or taking away a defense, and as such, is prohibited by the *Federal Constitution* (Article I, Sections 9, 10).

Defendant had a right to know in advance of his acts [which took place July 1, 1973 - December 31, 1973, according to the indictment (SCT 377)] whether his acts would subject him to criminal penalties.

Even assuming that Section 1310 of the *Health & Safety Code* would have been in effect at the time that the indictment charged petitioner with its violation, viz: July 1, 1973 to December 31, 1973, then its repeal on January 1, 1974, without a Savings Clause demonstrated a legislative intent to follow the long established common law and bar all prosecutions under said section, not reduced to final judgment at the time of the appeal.

The Opinion of the California Supreme Court in *People v. Rossi* (1976) 18 Cal.3d 295, 34 Cal. Rptr. 64, 555 P.2d 1313, explored the issue of whether or not *California Government Code* Section 9608 abrogated the common law rule requiring a dismissal of criminal proceedings not yet final and based on an abolished statute:

"Section 9608, we explained in *Estrada*,[4] was

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[4]Refers to *In re Estrada* (1965) 63 C.2d 740; 48 Cal.Rptr. 172; 408 P.2d 948.

enacted simply to authorize prosecutions under the former statute in order to avoid the technically absurd result by which a defendant could be prosecuted under no law, simply because the Legislature had decided to *increase* the punishment for his crime. [Citation.] We concluded, however, that the provision was not intended to abrogate the well-established common law rule which, in the absence of clear legislative intent to the contrary, accorded a criminal defendant the benefit of a mitigation of punishment adopted before his criminal conviction became final." (19 Cal.3d 299.)

As the United States Supreme Court has observed, it is "a universal common law rule that when the legislature repeals a criminal statute . . . this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not reached final disposition in the highest court authorized to review it." *(Bell v. Maryland* (1964) 378 U.S. 336, 340, 12 L. Ed.2d 822, 826, 84 S. Ct. 1814).

This universal common law rule has withstood the test of time. [See the opinion of Chief Justice Marshall in *United States v. Schooner Peggy* (1801) 5 U.S. (1 Cranch.) 103, 110, 2 L. Ed. 49, 51.]

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One.

Respectfully submitted,

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